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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 230

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The respondent, Joyce Agency, Inc., respectfully requests that the petition for a writ of certiorari filed by the petitioner in this Court on July 21, 1954, be denied.

The petitioner, the Secretary of Labor, is attempting to establish in this case a new boundary of coverage under the Fair Labor Standards Act. In view of the overwhelming authority against him, which was recognized and applied by the Court of Appeals for the Seventh Circuit, the petition should be denied.

REASONS FOR DENYING THE WRIT.

This Court has observed that "to search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle" (*Kirschbaum* v. *Walling*, 316 U. S. 517); that "what is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation" (*Gully* v. *First National Bank*, 299 U. S. 109, 117); and that "remoteness of a particular occupation from the physical process [of production] is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act" (*10 East 40th Street Bldg., Inc.* v. *Callus*, 325 U. S. 579, 583).

Common-sense would seem to indicate that guarding a warehouse is a "predominantly local situation." However, since "the Fair Labor Standards Act puts upon the Courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations" (*Kirschbaum* v. *Walling*, 316 U. S. 517), resulting in hundreds of adjudicated cases, an analysis of the bulk of the cases which factually resemble this one may furnish a "dependable touchstone" which will buttress the common-sense reaction.

Certain it is that this Court has drawn a line of coverage somewhere between the guarding of a loft building where manufacturing is carried on (*Kirschbaum* v. *Walling*, 316 U. S. 517) and the guarding of a building in which 48% of the rented area is occupied by the executive offices of manufacturing companies and whose occupants are most assuredly engaged in commerce (*10 East 40th Street Bldg.*,

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Inc. v. *Callus*, 325 U. S. 579). The distinction should be fairly obvious since Congress in the enactment of the Fair Labor Standards Act defined "commerce" narrowly and "production" broadly: to be covered an employee must be *engaged* in commerce, not merely affecting it as in other statutes, whereas he needed originally only to be *necessary* to production and more recently *directly essential* to production to be covered. A guard or watchman who stands by and watches a scene of production may be necessary or directly essential to production but it takes something more than watching to cause him to be actually "engaged in commerce."

A close analysis of the Secretary's position in this case will reveal that he is contending here that all activity of any kind whatsoever except transportation is "production," thus conveniently disposing of what he apparently finds to be a somewhat bothersome and limiting concept of "engaging in commerce." Under this concept there is no longer any handling in the stream of commerce nor any local handling of goods: if any employee so much as touches goods he is engaged in its production for interstate commerce; if a watchman sees the handling, he is also producing. The result of such reasoning is to destroy entirely the heretofore unchallenged Congressional intent to make the Fair Labor Standards Act cover less area than constitutionally possible and to convert the Act into one which undoubtedly would cover more area than constitutionally possible. In *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 503, 65 S. Ct. 335, 342, this Court stated:

> "The Government contends that in defining 'produced' the statute intends 'handled' or 'worked on' to mean not only handling or working on in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or move-

> ment in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a 'producer' of any goods he carries * * * If we * * * assume that handling for transit purposes is handling in production, we encounter results which we think Congress could not have intended."

As will subsequently be shown, handling for warehouse purposes is not handling in production either.

The Secretary is attempting to reason as follows:

> (1) Guards have been held in some cases to be covered;
>
> (2) The performance of warehouse functions has been held in some cases to be covered;
>
> (3) Therefore, the guarding of warehouse functions is an activity covered by the Fair Labor Standards Act.

Actually, the cases are remarkably uniform in holding contrary to the Secretary's position in this way:

> (1) Guards and watchmen are covered by the Act only when their duties are performed in connection with the operation of an enterprise producing goods for commerce and they are not covered when such duties are performed in connection solely with an enterprise engaging in commerce;
>
> (2) The function of warehousing may constitute engaging in commerce but does not constitute the production of goods for commerce; the storage of goods and the carriage or transportation of goods are commerce but are not production;
>
> (3) Therefore, guards and watchmen performing their duties in connection with the operation of a warehouse are clearly and decidedly not covered by the Fair Labor Standards Act.

A glance at the following table of "watchmen cases" indicates the uniformity of court decisions in this field and reveals how the decision of the Court of Appeals for the Seventh Circuit fits into the pattern of cases:

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Case	Citation	Jurisdiction and Year	Employee Not Covered by FLSA	Engaged in Commerce Only	Employee Covered by FLSA	In Production of Goods for Commerce	Facts
10 E. 40th St. Bldg. Inc. v. Callus	325 U. S. 578	U. S. Sup. Ct. 1945	x	x			Watchman of building in which 48% of rented area occupied by executive offices of manufacturing companies
Walton v. Southern Package Corp.	320 U. S. 540	U. S. Sup. Ct. 1944			x	x	Night watchman for veneer manufacturing plant
Russell Co., Inc. v. McComb	187 F. 2d 524	5th Circ. 1951			x	x	Guarded area where coffee and rice were packaged
Parham v. Austin Co.	158 F. 2d 566	5th Circ. 1946	x	x			Guarded plant construction
Wilson v. R. F. C.	158 F. 2d 564	5th Circ. 1946	x			x	Guarded housing of employees of manufacturing plant
Phillips v. Graham Aviation Co.	157 F. 2d 443	5th Circ. 1946	x	x			Guarded air field
Carrigan v. Provident Trust Co.	153 F. 2d 74	3rd Circ. 1946	x	x			Guarded bank
Engebretsen v. E. J. Albrecht Co.	150 F. 2d 602	7th Circ. 1945			x	x	Guarded area where materials required for building dams, etc., were repaired
Building Service Employees International Union v. Trenton Trust Co.	142 F. 2d 257	3rd Circ. 1944	x	x			Guarded trust company
Blumenthal v. Girard Trust Co.	141 F. 2d 849	3rd Circ. 1944	x	x			Caretaker of apartment building
Slover v. Wathen	140 F. 2d 258	4th Circ. 1944			x	x	Watchman at pier where barges were repaired
Noonan v. Fruco Construction Co.	140 F. 2d 633	8th Circ. 1943	x	x			Guarded construction of building for manufacture of munitions
Convey v. Omaha National Bank	140 F. 2d 650	8th Circ. 1943	x	x			Guarded bank building
Lofther v. First National Bank	138 F. 2d 299	7th Circ. 1943	x	x			Guarded bank building
Waller v. Humphreys	133 F. 2d 193	5th Circ. 1943	x	x			Guarded sea food plant when not in operation
Walling v. Sondock	132 F. 2d 77	5th Circ. 1942			x	x	Independent agency guarding producers

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Case	Citation	Jurisdiction and Year	Employee Not Covered by FLSA	Employer Engaged in Commerce Only	Employee Covered by FLSA	Employer Engaged in Production of Goods for Commerce	Facts
Johnson v. Dallas Downtown Dev. Co.	132 F. 2d 287	5th Circ. 1942	x	x			Guarded insurance company building
Mid-Continent Pipe Line Co. v. Hargrave	129 F. 2d 655	10th Circ. 1942			x	x	Guarded pipe line
Messenger v. T. C. Co.	107 F. S. 354	Okla. 1951			x	x	Guarded cotton compressing operations
Haynie v. Hogue Lumber & Supply Co.	96 F. S. 215	Miss. 1951	x	x			Guarded lumber yard
Craig v. Heide & Co.	94 F. S. 442	N. C. 1951			x	x	Guarded repair of vessels
Moehl v. DuPont & Co.	84 F. S. 427	Ill. 1947			x	x	Guarded ordnance plant
Bauler v. Pressed Steel Car Co.	81 F. S. 172	Ill. 1948			x	x	Guarded production of military goods
Campbell v. Jones & Laughlin Steel Co.	70 F. S. 906	Penn. 1947			x	x	Guarded steel plant
Lewis v. Florida Light & Power Co.	69 F. S. 23	Fla. 1946			x	x	Guarded electric generating plant
Walling v. West Kentucky Coal Co.	60 F. S. 681	Tenn. 1944			x	x	Guarded coal mine
Cushway v. Stork Engineering Co.	51 F. S. 568	Mich. 1943			x	x	Guarded factory
Hinkler v. 83 Maiden Lane	50 F. S. 263	N. Y. 1943	x	x			Guarded building housing insurance company
Reliance Co. v. Hubbard Storage & Inspection Co.	50 F. S. 1012	Va. 1943			x	x	Guarded raw tobacco prior to manufacture
Timberlake v. Day & Zimmerman, Inc.	49 F. S. 28	Iowa 1943			x	x	Guarded ordnance plant
Fleming v. Stillman	48 F. S. 600	Tenn. 1943			x	x	Guarded automobile reclamation plant
Bartholome v. Baltimore Fire Patrol Co.	48 F. S. 98	Md. 1942	x	x			Independent detective agency guarding various types of

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The courts have been careful to limit the applicability of the Act to guards and watchmen to those whose duties are performed at an establishment which produces goods for commerce. In short, guards and watchmen are brought within the Act by the "production" rather than the "commerce" provisions of the Act. In the absence of activities constituting production for commerce, guards and watchmen are outside the Act.

In *Engebretsen* v. *E. J. Albrecht Co.*, 150 F. (2d) 602 (C. C. A. 7th, 1945), the Court said at page 604:

> "It has been held that an employee who acts as a guard is engaged in the production of goods in commerce, if the employer is so engaged." [Citing cases.]
>
> "In reaching our conclusion we must look to the employee's activity rather than the employer's activity, so far as 'engaged in commerce' determines liability * * * However, where the employer is engaged in the production of goods for commerce, we need look only to see if the employee's work is essential thereto.
>
> "That he [a watchman] was an employee is not in dispute. That the character of his employment, namely, that of a guard, brought him within the language of the statute, we think clear, *provided the company was engaged in the production of goods for commerce.*" (Emphasis in Court's opinion.)

In *Carrigan* v. *Provident Trust Co.*, 153 F. (2d) 74 (C. C. A. 3rd, 1946), the Court held that a guard employed by a bank which admittedly was engaged in interstate commerce but did not produce goods, was not subject to the Act. The Court said at page 75:

> "An important distinction between the two definitions is evident. Congress described 'production' to include acts merely necessary to the production of goods. 'Commerce' on the other hand, is so closely circumscribed that acts merely necessary to commerce are not included. The wide variation in the scope of the two terms has frequently noted.

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"The employees concerned in [*A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517] * * * serviced buildings occupied by tenants principally engaged in the production of goods for interstate commerce. In sharp contrast the Court in *McLeod* v. *Threlkeld*, 319 U. S. 491, held a cook for maintenance-of-way employees of an interstate railroad not 'engaged in commerce' and therefore not within the coverage of the Act.

"In the instant case it is admitted that appellee bank did not produce goods. Hence, appellant-employee was not 'engaged in the production of goods for commerce,' and cases involving such production are not authoritative herein and are confusing."

The Court further stated at page 76:

"But for a rather remote possibility that the law would be violated by a person or persons violently and forcefully breaking into the bank premises with the intent of robbery, or that some emergency should arise as a fire or leaky pipe, the watchman's services would have no effect upon commerce, and even then the effect of the watchman's acts would be negative and not acts in commerce. He had no hand whatever in the affirmative acts which constitute commerce. No act within the scope of the appellant's duty touches any facet of the acts of commerce in which the bank was engaged. The watchman's services were separate and distinct from any function of the bank which goes into the conception of interstate commerce."

In *Slover* v. *Wathen*, 140 F. 2d 258 (C. C. A. 4th, 1944), the watchman held to be subject to the Act was clearly engaged in the production of goods and the Court said at page 260:

"Innumerable other cases also hold that *watchmen who are employed* to guard and protect property *for employers engaged in the production of goods for commerce come within the provisions of the Act.*" (Italics added.)

In *Russell Co.* v. *McComb*, 187 F. (2d) 524 (C. A. 5th,

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1951), the Court said that "the night watchman in question is employed to guard appellant's premises, including the warehouse building, offices, the area inside in which the *coffee and rice are packaged* for distribution * * * (page 525, italics added). The Court found that the watchman was engaged in the production of goods for commerce.

On the other hand the same Court of Appeals and the same Circuit Judge (McCord) in *Phillips* v. *Graham Aviation Co.*, 157 F. (2d) 443 (C. C. A. 5th, 1946), stated as follows at pages 443-4:

> "* * * appellants were employed as guards and watchmen by the Graham Aviation Company * * * in Georgia. Their duties and responsibilities were the usual ones of guards and watchmen to protect and safeguard persons and property on the premises of the employer.
>
> "Under contract with the United States Government, Graham Aviation Company was engaged in the training of student fliers for service in the air forces of the nation. Students from various parts of the United States were assigned to the field by military authorities. It is alleged that airplanes engaged in government service were frequently serviced and repaired at the field; that a canteen which sold goods that had been procured from the channels of interstate commerce, was operated for the benefit of students; and that planes from the field frequently crossed state lines—some going to Pennsylvania where appellee maintained another training field.
>
> "There is no issue as the 'production of goods for commerce,' and appellants must stand or fall on the issue of whether they are 'engaged in commerce.' It is unnecessary to discuss whether appellee's business of training student fliers for the government and operating a flying field for that purpose can be considered interstate commerce, for under the Fair Labor Standards Act and the many decisions it is clear that in such cases as this the work of the particular employee is decisive. * * * The work of these appellants was purely

> local in character; a mere guarding of the local airfield and the personnel and property thereon. On the facts of this case, a holding that such activity is 'interstate commerce' would be stretching coverage beyond the breaking point to include a situation far beyond the pale of the act."

In *Walling* v. *Sondock*, 132 F.(2d) 77 (C. C. A. 5th, 1942), the Court said at page 78:

> "Appellees operate an agency engaged in the business of furnishing guards or watchmen to various customers in and about Houston, Texas. * * * Upon these principles, *those watchmen charged with the protection and preservation of the buildings and machinery used to produce goods for commerce* perform duties having an essential relationship to the process of producing and distributing goods in interstate commerce."

The 1949 amendment of the definition of "produced" has not changed, but has instead strengthened, the concept that guards and watchmen are covered only when their work is closely related or directly essential to production for commerce.

Section 3 j of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. § 203) provides:

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, * * *."

Originallly, the following phrase concluded the definition:

> "or in any process or occupation necessary to the production thereof, in any State."

The 1949 amendment substituted for that phrase this one (63 Stat. 910):

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"or in any closely related process or occupation directly essential to the production thereof, in any State."

In the Conference Report upon the Fair Labor Standards Amendments of 1949, H. R. 1453, 81st Cong., 1st Sess., the House Managers reported at page 14:

"Coverage under the act for a large category of employees is determined by the definition of the term 'produced.' The definition is divided into two parts. The first part, which the conference bill leaves unchanged, covers any employee 'producing, manufacturing, mining, handling, transporting, or in any other manner working on * * * goods.' Thus the first part covers employees engaged in actual production activities *as opposed, for example, to employees engaged in maintenance, clerical, or custodial work.*" (Emphasis added.)

It is clear that the employees in this case are not covered by the first part of the definition. The Report continues:

"The second part of the present definition, covering any employee engaged in '*any* process or occupation *necessary* to the production' of goods, has been interpreted by the Administrator and the courts to cover employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce. * * *

"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above-cited cases. On the other hand, the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees *of manufacturers, mining companies, and other producers of goods for commerce.*" (Emphasis added.)

In the Statement of a majority of the Senate Conferees on the Fair Labor Standards Amendments of 1949, Cong.

Rec., 81st Cong., 1st Sess., pp. 15368-15377 (Oct. 19, 1949), the following appears:

> "Typical of the classes of employees whose work is closely related and directly essential to production, within the meaning of section 3(j) as amended by the conference agreement, are the following employees performing tasks necessary to effective productive operations of the producers: * * *
>
> "3. Plant guards, watchmen, and other employees performing protective or custodial services *for producers of goods.*" (Emphasis added.)

In the Statement of the Chairman of the House Committee on Education and Labor, on the House Conference Report, Cong. Rec., 81st Cong., 1st Sess., pp. 15135-15136 (Oct. 18, 1949), the following appears:

> "Employees engaged in activities which are several degrees or stages removed from the production of goods for commerce cannot be said to be engaged in a process or occupation closely related thereto."

These statements evince a clear understanding on the part of members of Congress that guards of plants producing for commerce are to be distinguished from guards of enterprises engaging in commerce. The distinction drawn by Congress must control the judicial interpretation of the coverage afforded by the Fair Labor Standards Act.

It is also clear that the courts have recognized that the warehousing function may constitute commerce but does not constitute production for commerce. In *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 63 S. Ct. 332 (1943), the Supreme Court said at page 568 (335):

> "There is no indication (apart from the exemptions contained in § 13) that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing

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goods in a warehouse can be allowed to defeat that purpose. The entry of goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency (*cf. De Loach* v. *Crowley's Inc.*, 5 Cir. 128 F. 2d 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce."

In *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 65 S. Ct. 807 (1945), the Supreme Court said at page 810:

> "Here petitioner's warehouse and central office employees are performing wholesale duties in the very midst of the stream of interstate commerce. They constantly deal with both incoming and outgoing interstate shipments."

In *Donovan* v. *Shell Oil Co., Inc.*, 168 F. (2d) 229 (C. C. A. 4th, 1948), the company had "no refinery in the State of Maryland, but it does maintain a bulk depot plant at Wagners' Point, Maryland." The Court held that "it is not and could not be disputed that the portion of the defendant's business with which we are here concerned, *i. e.*, the transportation of petroleum products into the State of Maryland from without the state, and *the subsequent distribution to points within and without Maryland, was commerce.*" Therefore the employer "was so closely related to the stream of commerce as to form a part of it" (page 231; emphasis added).

In *Walling* v. *American Stores Co.*, 133 F. (2d) 840 (C. C. A. 3rd, 1943), the Court held at page 846:

"We think the conclusion from these facts is clear that there is in this case a practical continuity of movement of the goods until they reach the defendant's retail stores. The maintenance of the warehouse * * * is not to break that continuity but to make it even, economical and uninterrupted. The conclusion, therefore, is that all of the defendant's warehouse employees are engaged in commerce within the meaning of the Act."

In *Marchant* v. *Sands Taylor & Wood Co.*, 75 F. Supp. 783 (D. Mass., 1948), the Court held (at pages 784-785):

"[The defendant employer, a wholesaler in flour, coffee and tea] had warehouses in Somerville, Massachusetts (where the plaintiff was employed), Worcester, Massachusetts, and Providence, Rhode Island, as well as regular jobbers in New Hampshire. The plaintiff regularly shipped merchandise from the warehouse at Somerville for delivery to the warehouse in Providence, and to jobbers in other states. *The plaintiff was engaged in commerce within the meaning of the Act.* His work involved the interstate delivery of defendant's merchandise." (Emphasis added.)

At pages 786 and 787, the Court describes in some detail the character of the employee's activities:

"He made up loading lists for the trucks * * * He watched the inventory of flour * * * When a customer came to the warehouse for supplies, plaintiff rang a bell and summoned warehousemen to help the customer * * * When freight cars arrived, he summoned warehousemen to unload them. He collected the time-cards of other workers * * * He opened the warehouse in the morning and closed it at night * * * Plaintiff fired the coal stoker, parked trucks, ground coffee beans, and did other manual tasks regularly."

In *McComb* v. *Blue Star Auto Stores, Inc.*, 164 F. (2d) 329 (C. C. A. 7th, 1948), the Court held (at page 331):

"*Under the circumstances here appearing* it is now well settled that *warehouse* and central office employees

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> who work either at selling or delivering across State lines, or at buying and receiving across State lines, *are employed in commerce* whether they write letters, keep books, or load or unload or drive the trucks * * * [citing cases]." (Emphasis added.)

As dictum the Court stated (at page 339):

> "All employees engaged in procuring goods from other states for transportation to and delivery at employer's warehouses are engaged in 'commerce' within the meaning of the Act; likewise, employees engaged in unloading and checking goods shipped in interstate commerce, and in handling them on the platforms, as well as those engaged in shipping such goods from warehouses in Illinois to stores in another state are all engaged in the production of goods for commerce or in an occupation necessary to such production. *Walling* v. *Goldblatt Bros.*, 7 Cir., 152 F. 2d 475, 476."

In 152 F. 2d 475, the Court had held simply that the retail exemption did not apply to certain Goldblatt operations, and in *Walling* v. *Goldblatt Bros., Inc.*, 128 F. (2d) 778 (C. C. A. 7th, 1942), this Court held in connection with activities at Goldblatt warehouses that:

> "*Persons engaged in shipping goods to the Indiana stores are engaged in interstate commerce.*" (Emphasis added.)

The Court did not hold in any of the Goldblatt decisions that employees performing a warehousing function (whether in connection with the receipt of goods into the warehouse, storage, or shipping out of the warehouse) were engaged in any activity other than commerce. It was held merely that certain employees involved in the manufacture or processing of goods were engaged in production for commerce. The warehouses guarded by respondent's employees are the scenes of activities undertaken by Goldblatt employees which are largely local or intrastate in character, are to a minor part of an interstate nature,

and are in no measure "production" within the meaning of the Fair Labor Standards Act.

The inevitable conclusion reached is supported by several self-evident propositions. First, where the establishment guarded is not the scene of production, it is superfluous to note that the guards are not engaged in production activities. Second, despite the fact that the establishment guarded is the scene of interstate commerce, a guard's connection with that commerce is less than substantial and has not been considered sufficient enough to warrant the conclusion that he too is engaged in commerce. See: *Phillips* v. *Graham Aviation Co.*, 157 F. (2d) 433 (C. C. A. 5th, 1946); *Carrigan* v. *Provident Trust Co.*, 153 F. (2d) 74 (C. C. A. 3rd, 1946). Third, unless a guard be considered engaged in commerce or the production of goods for commerce, he cannot be held to be within the Act.

The decision and opinion of the Court of Appeals for the Seventh Circuit conform to the law uniformly laid down everywhere and therefore it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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BRIEF FOR JOYCE AGENCY, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 230.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR JOYCE AGENCY, INC.

OPINIONS BELOW.

The opinion of the District Court (R. 92-100) is reported at 110 F. Supp. 918, and the "Findings of Fact and Conclusions of Law" appear in the record at pages 100 to 118. The opinion of the Court of Appeals (R. 125-133) is reported at 211 F. 2d 241.

JURISDICTION.

The judgment of the Court of Appeals (R. 133) was entered on March 29, 1954, and petitioner's petition for rehearing was denied on April 23, 1954 (R. 135). Certiorari was granted on October 14, 1954 (R. 137). The jurisdiction of this Court rests on 28 U. S. 1254 (1).

QUESTION PRESENTED.

Whether guards and watchmen, and related clerical workers, employed to furnish theft and fire protection to the warehouses of a retail department store organization, where merchandise from out-of-State sources is received, unloaded, and to some extent shipped out of the State, are engaged "in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

STATUTE INVOLVED.

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 63 Stat. 910; 29 U. S. C. 201 *et seq.*, are:

Definitions:

Section 3 (63 Stat. 911): As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication, among the several States or between any State and any place outside thereof.

* * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

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Maximum Hours:

Section 7 (63 Stat. 912):

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

• • • • •

SUMMARY OF ARGUMENT.

Respondent's guards and related clerical workers furnishing theft and fire protection to the warehouses of a retail department-store organization are engaged in purely local activities and are not engaged "in commerce or in the production of goods for commerce."

A. Administrative interpretation and the Federal courts have already held that the very warehouses in this case are the scenes of activities primarily local in nature, to some extent constitute commerce, but to no extent may be deemed production for commerce, and that persons guarding such warehouses where no manufacturing is carried on are not covered by the Fair Labor Standards Act.

B. Respondent's employees are not engaged "in commerce."

C. Respondent's employees are not engaged "in the production of goods for commerce."

1. Guards and watchmen are covered by the Act only when their duties are performed in connection with the operation of an enterprise producing goods for commerce and they are not covered when such duties are performed solely in connection with an enterprise engaging in commerce.

2. The function of warehousing may constitute engaging in commerce but does not constitute the production of goods for commerce; the storage of goods and the carriage or transportation of goods are commerce but are not production.

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ARGUMENT.

RESPONDENT'S GUARDS AND RELATED CLERICAL WORKERS FURNISHING THEFT AND FIRE PROTECTION TO THE WAREHOUSES OF A RETAIL DEPARTMENT-STORE ORGANIZATION ARE ENGAGED IN PURELY LOCAL ACTIVITIES AND ARE NOT ENGAGED "IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE."

Much of the Secretary of Labor's Brief in this case is phrased in such a way that, while it would be applicable and pertinent if the question here were the coverage under the Fair Labor Standards Act of employees participating in the stream of interstate commerce flowing through a warehouse, nevertheless it is completely beside the point in answer to the question actually presented as to the coverage of persons *watching* the activities in a warehouse. In fact the persons which the Secretary is attempting to bring under the Act in this case merely *watch* activities which themselves are primarily local in nature but to some extent constitute interstate commerce of a retailer, most of whose employees are exempt from the Act under the retail exemption. The step envisaged by this case goes much too far. As this Court has said:

> "Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act." *10 East 40th Street Bldg., Inc.* v. *Callus,* 325 U. S. 579, 583 (1945).

A. Administrative Interpretation and the Federal Courts Have Already Held That the Very Warehouses in This Case Are the Scenes of Activities Primarily Local in Nature, to Some Extent Constitute Commerce, But to No Extent May Be Deemed Production for Commerce, and That Persons Guarding Such Warehouses Where No Manufacturing Is Carried on Are Not Covered by the Fair Labor Standards Act.

The question raised in this case is by no means novel either to the Secretary of Labor (or his predecessor, the Wage and Hour Administrator) or to the Federal Courts. When the complaint herein was first filed in the Federal District Court on October 13, 1949 (R. 2), it marked a complete reversal of eight prior years of continuous administrative interpretation, involving the same employment and the same warehouses, exactly contrary to what is contended for here by the Secretary of Labor. The question involved here had also during that eight-year period been adjudicated adversely to the Secretary's present position by the District Court, the Court of Appeals and this Court (to the extent that denials of certiorari fit into a pattern established by this Court in other decided cases) in cases involving the same employment and the same warehouses, as well as in all other cases concerning similar situations.

The Wage and Hour Administrator (who was then administering the Fair Labor Standards Act, which is now enforced by the Secretary of Labor) first concerned himself with the warehouse operations of Goldblatt Bros., Inc. (hereinafter sometimes called "Goldblatt"), on April 16, 1940, when he filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to enjoin Goldblatt from violating Sections 15(a)(1) and 15(a)(2) of the Fair Labor Standards Act in respect to employees working at three warehouses

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located at 3932 South Wolcott Avenue, 3932 Wentworth Avenue and 1927 West Pershing Road, in Chicago, Illinois, where merchandise was shipped from forty-five states, title to such merchandise passing to Goldblatt upon delivery at the warehouses and the merchandise then being distributed to Goldblatt's retail stores, some of which stores were in Indiana. At the close of the Administrator's case, the District Court, on its own motion, held that "plaintiff has failed to prove that defendant's employees are engaged in commerce, or in the production of goods for commerce" for the reasons that the merchandise involved "had come to rest in defendant's warehouses" and that the shipments to Indiana when considered with Goldblatt's entire business, "comprise a continuous and integrated business and economic unit, local in character, such as naturally grow up adjacent to a great metropolitan center such as Chicago." *Fleming* v. *Goldblatt Bros., Inc.*, 39 F. Supp. 701 (N. D. Ill., 1941).

This decision was appealed and in *Walling* v. *Goldblatt Bros., Inc.*, 128 F. (2d) 778 (C. C. A. 7th, 1942), the Court of Appeals for the Seventh Circuit held that Goldblatt's employees "who unload wares at the warehouses are working on goods still in interstate commerce, and are therefore, subject to the Act," as also are "all employees engaged in checking such interstate goods prior to the time they have come to rest on the platform." However, the Court further held that "since upon delivery of the goods at defendant's warehouse, interstate movement has ceased, employees concerned solely with subsequent moving and storing of the goods in the warehouses are not in commerce" and "employees shipping goods from the warehouses to the Illinois stores are not within the Act." Furthermore, "*persons engaged in shipping goods to the Indiana stores are engaged in interstate commerce*" and "since the evidence indicates that all * * * [manufactur-

ing] employees manufacture goods without distinction as to whether they are to be sent to Indiana or to Illinois, all such manufacturing employees are within the Act.' The Court said:

> "We conclude that those employees who order and procure, those who unload goods from without the state, at defendant's warehouses; those who check them before they are deposited on the unloading platform, those who manufacture goods at the warehouses, *those engaged in maintaining, operating, caring for and servicing warehouses where production for commerce occurs,* and those who pack and ship goods to Indiana from the warehouses *are within the Act.* Those employees, however, who are concerned solely with storage in the warehouses and in delivery of goods to the Illinois stores and those printing and preparing record books, memoranda, and advertising copy are not subject to the Act." (All emphasis in this Brief has been supplied unless otherwise noted.)

The Court then stated that "what we have said shall not prejudice in any manner defendant's right to prove any of the statutory exemptions" and "we • • • remand the cause for such findings as ought to be made and such judgment as should be entered after the evidence has been heard."

This opinion was rendered on June 25, 1942. Petition for certiorari was filed in the United States Supreme Court by the Wage and Hour Administrator on September 25, 1942. On January 18, 1943, the Supreme Court of the United States announced its decisions in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572. Two weeks *after* the *Jacksonville* and *Higgins* cases—on February 1, 1943—this Court denied certiorari in the *Goldblatt* case, 318 U. S. 757. The total impact of these events—the *Jacksonville* and *Higgins* decisions and the subsequent denial of certiorari in the *Gold-*

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blatt case—gave a clear indication that insofar as the Supreme Court was concerned all was not simple black-and-white in the case of warehouse employees. Some were *not* covered by the Fair Labor Standards Act because they were engaged in purely local activities and others were covered because they were engaged in the stream of interstate commerce. None was held to be covered because they were engaged in production. The Wage and Hour Administrator, *after denial of certiorari* in the *Goldblatt* case, sought a rehearing of that case in the Court of Appeals for the Seventh Circuit on the ground that the *Jacksonville* decision required the Court of Appeals to change its decision in the *Goldblatt* case. The petition for rehearing was denied. Thus after every effort had been exhausted the opinion of the Court of Appeals was permitted to stand and it clearly held that

> "Persons engaged in shipping goods to the Indiana stores are engaged in interstate commerce."

Contrast this express holding with the District Court's opinion in the present case (which was reversed by the Court of Appeals):

> "The manifold activities of Goldblatt's employees in picking, handling, checking, packing and transporting goods destined for Goldblatt's stores or customers outside the State of Illinois constitute the 'production for commerce within the meaning of the Act'." (R. 96.)

The stipulated facts in the present case are that:

> "The duties of the defendant's employees and their relationship to the Goldblatt operations have remained substantially unchanged since 1938." (R. 58.)

The 1942 decision by the Court of Appeals in the *Goldblatt* case is important in another respect. At that time:

> "Some manufacturing operations are carried on in

some of the warehouses. There are processed bakery and food products, meat compounds, blankets, draperies, slipcovers, and other articles."

The court held that:

"Those engaged in maintaining, operating, caring for and servicing warehouses *where production for commerce occurs* * * * are within the Act."

At the time of the present case all manufacturing operations were completely separated from the warehouse operations and the watchmen at the manufacturing locations (Lexington Bakery, 2608 Lexington Street, and Martin Food Products, Inc., 3641 South Iron Street, Chicago) had been paid in accordance with the Fair Labor Standards Act for about five years (R. 50-52). In regard to this phase of the case, the District Court said:

"Since the defendant has complied with the Act in the case of its employees at the Lexington Bakery since May 2, 1949, and since it has no employees at the Martin Food Products since July 3, 1949, both prior to the filing of this action, the Court considers the question as to defendant's compliance in these two instances as moot. The employees at these establishments, therefore, are not the subject of this decision." (R. 93).

Upon remandment of the 1942 case in *Walling* v. *Goldblatt Bros., Inc.*, 56 F. Supp. 255 (N. D. Ill., July 11, 1944), the Court found that Goldblatt then operated fourteen department stores, one drug store, six warehouses and one bakery, including single stores in Hammond, Gary and South Bend, Indiana, Milwaukee, Wisconsin, and Buffalo, New York. The Judge then found "as a matter of law that defendant is operating a retail establishment within the meaning of Section 13(a)(2) and that all of its employees are employed in a local retailing capacity within the meaning of Section 13(a)(1) and are therefore not subject to the Act." [Relying upon *Allesandro* v. *C. F.*

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Smith Co., 136 F. (2d) 75 (C. C. A. 6th); *Walling* v. *L. Wieman Co.*, 138 F. (2d) 602 (C. C. A. 7th) cert. den., 321 U. S. 785; *Walling* v. *Block*, 139 F. (2d) 268 (C.C.A. 9th), cert. den. 321 U. S. 788.]

The second judgment of the District Court was reversed in *Walling* v. *Goldblatt Bros., Inc.*, 152 F. (2d) 475 (C. C. A. 7th, November 29, 1945), wherein the Court of Appeals based reversal upon the fact that the Supreme Court of the United States in *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, affirmed a decision of the Court of Appeals for the First Circuit, 144 F. (2d) 102, which was in conflict with the three decisions relied upon by the District Court. The Court said that "under this decision we feel impelled to hold that a majority of defendant's employees working in its central office, located in the State Street store, in the bakery, in the drapery workshop, located in the State Street warehouse, and in the five warehouses, not including the State Street warehouse, are engaged in wholesaling and manufacturing functions which are neither retail nor local, and that as to such employees, the exception under Section 13(a)(1) or 13(a)(2) in inoperative."[1] This de-

1. It should be noted that *all* other employees of Goldblatt were held to be governed by the retail exemption and hence not subject to the Fair Labor Standards Act. To this day it has never been contended that *any* employees in the Wabash warehouse are subject to the Fair Labor Standards Act.

The one fact in the legislative history of the Act which was emphasized repeatedly and unequivocally and with never a dissenting voice was that the business of local retail selling was not covered by the Act. The original bill (S. 2475, H. R. 7200) did not by its express terms exempt local retailers, but the then Assistant Attorney General (later Mr. Justice) Jackson explained in a memorandum that "the bill does not attempt to cover purely local pursuits or intrastate service trades" (Joint Hearings, p. 56) and testified that "it is not intended by this bill to affect the retail trades or the service trades" (Joint Hearings, pp. 39-40); "the policy of the bill is not to include the service trades * * * and the retailing enterprises * * * the bill does not affect the retail trades" (pp. 35-6).

The Senate Committee bill (S. Rep. No. 884, 75th Cong., 1st

cision related solely to the retail exemption and in no way related to the commerce holdings of the previous decision in 128 F. 2d 778. The cause was remanded for further proceedings.

Certiorari to the Supreme Court of the United States was denied in 328 U. S. 854, upon the petition of Goldblatt.

Sess.) exempted from coverage any person employed in a "local retailing capacity." In introducing the Senate bill, Senator (now Mr. Justice) Black, Chairman of the Senate Committee on Labor, stated that "we therefore eliminate in the beginning any idea that this is an effort to regulate wages and hours in the various service employments throughout the nation" because it was the "prevailing" if not "unanimous" sentiment of the Committee that "businesses of a purely local type which serve a particular local community, and which do not send their products into the streams of interstate commerce, can be better regulated by the laws of the communities and of the states in which the business units operate" (81 Cong. Rec. 7648).

The House Committee bill (H. Rep. No. 1452, 75th Cong., 1st Sess.) was substantially similar to the Senate Committee bill, but was later amended (H. Rep. No. 2182, 75th Cong., 3rd Sess.) to include employees of employers *"affecting commerce"* and *"purchasing goods in commerce."* The bill passed the House after an amendment to make clear the Congressional purpose to exclude local retailers was made from the floor and adopted (83 Cong. Rec. 7449) "to dissolve all doubt, dispel all chance of misinterpretation" and to make "clear beyond peradventure of a doubt that retailing is exempted" (p. 7438). Debate in the House included statements that "it is clearly understood" that the bill "absolutely exempts retailing" (83 Cong. Rec. 7281-2); that not even by the "wildest stretch of the imagination" and "regardless of any possible administrative interpretations" such businesses as the "local groceryman, druggist, clothing store, meat dealer—any merchant, in fact—laundry, hospital, hotel, or even transportation companies operating solely within a State" were "absolutely not" affected (p. 7299); that "retail establishments are absolutely out of the provisions of the bill" (p. 7308); that it had "been stated time and time again that local retailing is exempt from the bill" (pp. 7436-7).

The Act as finally passed by both houses eliminated all references to "affecting commerce" and "purchasing goods in commerce" and retained the express retail exemptions. The legislative history conclusively establishes the fact that the "retailing capacity" and "retailing establishment" exemptions of Section 13 (a)(1) and (2) would have effectively existed, even in the absence of their express inclusion, because of the indicated scope of coverage.

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Finally, in *McComb* v. *Goldblatt Bros., Inc.*, 166 F. (2d) 387 (C. C. A. 7th, 1948), the Court of Appeals affirmed the District Court's denial of an injunction on the ground that the defendant had by then fully complied with the Fair Labor Standards Act. The Court of Appeals in affirming the District Court said on March 3, 1948:

> "The [District] court found that *all employees of the company, for a long time past, had been compensated in accordance with the provisions of the Act;* • • • that plaintiff [Wage and Hour Administrator] did not dispute defendant's present compliance • • • "

The stipulated facts in the present case include the following (R. 58):

> "While from time to time (1) Goldblatt warehouse and bakery operations have been carried on in different buildings, (2) departments have been changed from one warehouse to another, and (3) departments have been added, eliminated, expanded or reduced, the general character and function of the various departments and the general duties of Goldblatt employees in the departments have remained substantially the same continuously from 1938 to the date hereof.
>
> "The duties of the defendant's employees and their relationship to the Goldblatt operations have remained substantially unchanged since 1938."

The relation of the Goldblatt warehouses and the persons employed in them to the Fair Labor Standards Act had been before the Federal District Court, the Court of Appeals and the Supreme Court continuously from 1940 to 1948 and yet in that eight-year period the Wage and Hour Administrator had never contended that the guards and watchmen of Goldblatt warehouses where no manufacturing was carried on were subject to the Act. The significance of this long adhered to administrative interpretation should not be overlooked. In *A. B. Kirschbaum*

Co. v. *Walling*, 316 U. S. 517 (1942), this Court made a pertinent observation:

> "The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

Nor should the administrative agency entrusted with the enforcement of legislation forever seek to expand its meaning to include in today's interpretation what was never in yesterday's contemplation.

The Federal Courts in the *Goldblatt* cases did establish what in every sense except a technical one is and should be *res adjudicata* to the effect that some of the employees in the Goldblatt warehouses are *not* covered by the Fair Labor Standards Act because engaged in purely local activities and some are covered because engaged in interstate commerce but none is covered because engaged in production for commerce, and persons such as watchmen are covered only when they are protecting production and not when they watch a combination of local and interstate activity.

The administrative and judicial determination of these principles was not limited to the *Goldblatt* cases but has been entirely uniform.

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B. Respondent's Employees Are Not Engaged "in Commerce".

If it is recalled that the persons sought to be covered by the Fair Labor Standards Act here are not the persons participating in interstate commerce but rather those persons who guard premises which are to a minor extent involved in commerce, it is not difficult to conclude that such persons are, under the tests intended by Congress and established by this Court, not engaged "in commerce."

In *10 East 40th Street Bldg., Inc.* v. *Callus*, 325 U. S. 578 (1945), this Court, in holding that watchmen and maintenance employees of an office building housing various tenants engaged in commerce were not covered by the Fair Labor Standards Act when no manufacturing was carried on within the building, said at page 581:

> "The respondents are maintenance employees of the building, elevator starters and operators, window cleaners, *watchmen* and the like • • • *Obviously they are not 'engaged in commerce.'*"

There appears to be no question at all but that a substantial portion of the tenants in the 10 East 40th Street building were engaged in commerce. 20 concerns occupying 25.8% of the rented area "use their offices • • • for taking orders for substantial quantities of merchandise of substantial value produced and shipped from their factories and mines elsewhere located to customers in various states." Offices of sales agencies representing 17 concerns occupying 9.3% of the rented area take orders and "as a result of the efforts of these agencies, substantial amounts of merchandise of substantial value are shipped across state lines from factories, mines and warehouses, elsewhere located in various parts of the country." Advertising agents occupying 6.6% of the rented area "carry on publicity and advertising work using national publications,

newspapers and radio." Engineering and construction firms occupying 8.9% of the rented area have employees who "prepare plans and sketches in the building for construction projects located in various parts of the United States and in foreign countries." Investment organizations occupying 4.7% of the rented area do work "in connection with businesses and projects located in various parts of the country." Import and export company offices occupy 3.7% of the rented area, 51 F. Supp. 528 at 529-30 (S. D. N. Y., 1943).

Thus about 60% of the tenants of the 10 East 40th Street building were engaged in commerce, yet this Court found that "obviously they [watchmen] are not 'engaged in commerce.'" 325 U. S. 578 at 581. The Court of Appeals for the Second Circuit observed that the employees of the 10 East 40th Street building, "can not effectively contend that they are 'engaged in [interstate] commerce.' *McLeod* v. *Threlkeld*, 319 U. S. 491." 146 F. 2d 438 at 440 (C. C. A. 2d, 1944).

In *McLeod* v. *Threlkeld*, 319 U. S. 491 (1943), this Court, in holding that a cook for workers engaged in commerce was not himself engaged in commerce, established the test for determining whether an employee is 'engaged in commerce' (p. 497):

> "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase 'production of goods for commerce.'
>
> "It is not important whether the employer, in this case the contractor, is engaged in commerce. It is the work of the employee which is decisive. Here the

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employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other."

In *Overstreet* v. *North Shore Corporation*, 318 U. S. 125 (1943), this Court stated that it would look to the Federal Employers' Liability Act and cases decided thereunder in determining the coverage intended by the phrase "engaged in interstate commerce" as used in the Fair Labor Standards Act, saying at pages 128-9 and 131-2:

> "A practical test of what 'engaged in interstate commerce' means has evolved in cases arising under the Federal Employers' Liability Act (45 U. S. C. § 51 *et seq.*, 45 U. S. C. A. § 51 *et seq.*) which, before the 1939 amendment (see 53 Stat. 1404, 45 U. S. C. A. §§ 51, 54, 56, 60), applied only where injury was suffered while the carrier was engaging in interstate or foreign commerce and the injured employee was employed by the carrier 'in such commerce.'
>
> "The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. Both are aimed at protecting commerce from injury through adjustment of the master-servant relationship, the one by liberalizing the common law rules pertaining to negligence and the other by eliminating sub-standard working conditions. We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the *Pedersen* [*Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146] and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

In *McLeod* v. *Threlkeld*, 319 U. S. 491, the Court repeated the importance of the Federal Employers' Liability Act in measuring the scope of the Fair Labor Standards Act (p. 495):

> "• • • the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employments 'in commerce' under the Fair Labor Standards Act."

Cases decided by this Court and lower courts uniformly held that a watchman guarding interstate commerce was not closely enough related to such commerce to be a part of it. In *New York Central Railroad Co.* v. *White*, 243 U. S. 188 (1916), this Court held that "a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad" (p. 191) was not covered by the Federal Employers' Liability Act. This Court said (page 192):

> "The test is, 'Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?' *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558."

In *Armour & Co.* v. *Wantock*, 323 U. S. 127 (1944), this Court said at page 131:

> "*McLeod* v. *Threlkeld* • • • which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged 'in commerce', and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce."

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Legislative history leaves no doubt as to the correctness of this Court's view that "the test of whether one is in commerce is obviously more exacting." In *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942), this Court said:

> "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employees 'engaged in commerce in any industry affecting commerce'. See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce.' H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67. Moreover, in one of its intermediate stages, the measure incorporated the *Shreveport* doctrine, *Houston & Texas Ry.* v. *United States*, *supra*, in that it was specifically made applicable to intrastate production which competed with goods produced in another state. S. 2475, 75th Cong. 3rd Sess., as recommitted December 17, 1937, § 8(a). But, as reported by the House Committee on Labor, this provision was deleted. S. 2475, *supra*, as reported April 21, 1938; see H. Rep. 2182, *supra*."

C. Respondent's Employees Are Not Engaged "in the Production of Goods for Commerce."

1. Guards and Watchmen Are Covered by the Act Only When Their Duties Are Performed in Connection with the Operation of an Enterprise Producing Goods for Commerce and They Are Not Covered When Such Duties Are Performed Solely in Connection with an Enterprise Engaging in Commerce.

The language of the Fair Labor Standards Act, the intent of Congress in passing and amending the Act, the Supreme Court and all lower courts considering the matter, as well as the Wage and Hour Administrator and Secretary of Labor in construing the Act, have limited

the applicability of the Act to guards and watchmen whose duties are performed at an establishment which produces goods for commerce. In short, guards and watchmen are brought within the Act by the "production" rather than by the "commerce" provisions of the Act. In the absence of activities constituting *production* for commerce, guards and watchmen are outside the Act.

Statutory Language and Congressional Intent. Section 3(j) of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. § 203) provides:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, • • •."

Originally, the following phrase concluded the definition:

> "or in any process or occupation necessary to the production thereof, in any State."

The 1949 amendment substituted for that phrase this one (63 Stat. 910):

> "or in any closely related process or occupation directly essential to the production thereof, in any State."

In the Conference Report upon the Fair Labor Standards Amendments of 1949, H. R. 1453, 81st Cong., 1st Sess., the House Managers reported at page 14:

> "Coverage under the act for a large category of employees is determined by the definition of the term 'produced.' The definition is divided into two parts. The first part, which the conference bill leaves unchanged, covers any employee 'producing, manufacturing, mining, handling, transporting, or in any other manner working on • • • goods.' Thus the first

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part covers employees engaged in actual production activities *as opposed, for example, to employees engaged in maintenance, clerical, or custodial work.*" (Emphasis added.)

It is clear that the employees in this case are not covered by the first part of the definition. The stipulated facts in the present case provide as follows (R. 50):

"Defendant's employees employed at the Wentworth Warehouse, the Ashland Avenue Warehouse and Garage, the 63rd Street Warehouse, and the alley between the State Street Store and the Wabash Avenue Warehouse do not physically handle the goods received at or shipped from said warehouses, except insofar as they may handle stolen goods recovered by defendant's employees, as described in paragraphs 8(e), 17(e), and 31(d) hereof. The total amount of stolen goods recovered by defendant's employees is approximately $300.00 per year."

The Conference Report continues:

"The second part of the present definition, covering any employee engaged in '*any* process or occupation *necessary* to the production' of goods, has been interpreted by the Administrator and the courts to cover employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce. * * *

"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above-cited cases. On the other hand, the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees *of manufacturers, mining companies, and other producers of goods for commerce.*" (Emphasis added.)

In the Statement of a majority of the Senate Conferees on the Fair Labor Standards Amendments of 1949, Cong.

Rec., 81st Cong., 1st Sess., pp. 15368-15377 (Oct. 19, 1949), the following appears:

> "Typical of the classes of employees whose work is closely related and directly essential to production, within the meaning of section 3(j) as amended by the conference agreement, are the following employees performing tasks necessary to effective productive operations of the producer: * * *
>
> "3. Plant guards, watchmen, and other employees performing protective or custodial services *for producers of goods.*" (Emphasis added.)

In the Statement of the Chairman of the House Committee on Education and Labor, on the House Conference Report, Cong. Rec., 81st Cong., 1st Sess., pp. 15135-15136 (Oct. 18, 1949), the following appears:

> "Employees engaged in activities which are several degrees or stages removed from the production of goods for commerce cannot be said to be engaged in a process or occupation closely related thereto."

These statements evince a clear understanding on the part of members of Congress that guards of plants producing for commerce are to be distinguished from guards of enterprises engaging in commerce. The distinction drawn by Congress must control the judicial interpretation of the coverage afforded by the Fair Labor Standards Act.

Supreme Court Cases. In *Walton* v. *Southern Package Corporation,* 320 U. S. 540 (1944), this Court held that the night watchman at a veneer manufacturing plant which shipped a substantial portion of its product in interstate commerce was "necessary to the production" of veneer and within the coverage of the Act. The decision was based solely and completely upon *A. B. Kirschbaum Co.* v. *Walling,* 316 U. S. 517 (1942), which was the only case cited. Mr. Justice Roberts concurred in the result "considering himself bound by the decision in *A. B. Kirsch-*

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baum Co. v. *Walling.*" This Court quoted from the *Kirschbaum* case the statement that "the maintenance of a safe, habitable building is indispensable to that activity [production]" and that the relationship of Walton's employment to production was therefore not "tenuous" but had that "close and immediate tie with the process of production for commerce" which brought him within the coverage of the Act.

In *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942), the question decided was stated by the Court:

> "The employees here are engaged in the operation and maintenance of a loft building in which large quantities of goods for interstate commerce are produced. Does the Fair Labor Standards Act extend to such employees?"

In holding that the Act did apply, this Court construed only one clause of the Act—"necessary to the production." This Court said:

> "The normal and spontaneous meaning of the language by which Congress defined in § 3(j) the class of persons within the benefits of the Act, to wit, employees engaged 'in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof,' encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants
> * * *
> "* * * 'Necessary' is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority. We cannot, in construing the word 'necessary', escape an inquiry into the relationship of the particular employees to the production of goods for commerce."

In *10 East 40th Street Bldg., Inc.* v. *Callus*, 325 U. S. 478 (1945), this Court, in holding that watchmen and

maintenance employees of an office building housing various tenants engaged in commerce were not covered by the Act so long as no manufacturing was carried on within the building, made a clear distinction between watchmen of production who are subject to the Act (as in the *Kirschbaum* case) and watchmen of commerce who are not subject to the Act (*Callus* case).

In *McLeod* v. *Threlkeld*, 319 U. S. 491 (1943), this Court held that a cook employed to feed maintenance-of-way workers on an interstate railroad was not covered by the Fair Labor Standards Act. In that same case, this Court stated with approval the fact that two Courts of Appeal had held that cooks employed to feed workers engaged in the production of goods for commerce were covered by the Act (p. 493, footnote 4; *Hanson* v. *Lagerstrom*, 133 F. 2d 120 (C. C. A. 8th, 1942) and *Consolidated Timber Co.* v. *Womack*, 132 F. 2d 101 (C. C. A. 9th, 1942)). It requires but the substitution of the word "watchman" for the word "cook" to conclude that a watchman employed to guard workers engaged in the production of goods for commerce is covered by the Act but a watchman employed to guard workers engaged in commerce is not covered.

In the *McLeod* case, this Court said at page 493:

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause. Our question is whether he was 'engaged in commerce.' "

The dissenting opinion in that case pointed out at page 501:

> "If the applicable provision were 'engaged in the production of goods for commerce' instead of 'engaged in commerce,' our decisions make it clear that employees such as the janitor and the shop tender and probably petitioner would be within the Act."

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Lower Court Cases. In *Engebretsen* v. *E. J. Albrecht Co.*, 150 F. (2d) 602 (C. C. A. 7th, 1945), the Court of Appeals said at page 604:

> "It has been held that an employee who acts as a guard is engaged in the production of goods in commerce, if the employer is so engaged." [Citing cases.]
>
> "Under the plain language of the statute and under the decisions we are convinced that plaintiff was required to show: (a) that he was an employee, (b) that his employer was engaged in the production of goods for commerce, and his was an occupation necessary to such production; or, that he was (a) an employee (b) who is engaged in commerce.
>
> "In reaching our conclusion we must look to the employee's activity rather than the employer's activity, so far as 'engaged in commerce' determines liability. * * * However, where the employer is engaged in the production of goods for commerce, we need look only to see if the employee's work is essential thereto.
>
> "That he [a watchman] was an employee is not in dispute. That the character of his employment, namely, that of a guard, brought him within the language of the statute, we think clear, *provided the company was engaged in the production of goods for commerce.*" (Emphasis in Court's opinion.)

In *Carrigan* v. *Provident Trust Co.*, 153 F. (2d) 74 (C. C. A. 3rd, 1946), the Court held that a guard employed by a bank which admittedly was engaged in interstate commerce but did not produce goods, was not subject to the Act. The Court said at page 75:

> "An important distinction between the two definitions is evident. Congress described 'production' to include acts merely necessary to the production of goods. 'Commerce' on the other hand, is so closely circumscribed that acts merely necessary to commerce are not included. The wide variation in the scope of the two terms has been frequently noted.
>
> "The employees concerned in [*A. B. Kirschbaum*

> *Co.* v. *Walling*, 316 U. S. 517] • • • serviced *buildings occupied by tenants* principally engaged in the production of goods for interstate commerce. In sharp contrast the Court in *McLeod* v. *Threlkeld*, 319 U. S. 491, held a cook for maintenance-of-way employees of an interstate railroad not 'engaged in commerce' and therefore not within the coverage of the Act.
>
> "In the instant case it is admitted that appellee bank did not produce goods. Hence, appellant-employee was not 'engaged in the production of goods for commerce,' and cases involving such production are not authoritative herein and are confusing."

The Court further stated at page 76:

> "But for a rather remote possibility that the law would be violated by a person or persons violently and forcefully breaking into the bank premises with the intent of robbery, or that some emergency should arise as a fire or leaky pipe, the watchman's services would have no effect upon commerce, and even then the effect of the watchman's acts would be negative and not acts in commerce. He had no hand whatever in the affirmative acts which constitute commerce. No act within the scope of the appellant's duty touches any facet of the acts of commerce in which the bank was engaged. The watchman's services were separate and distinct from any function of the bank which goes into the conception of interstate commerce."

In *Slover* v. *Wathen*, 140 F. 2d 258 (C. C. A. 4th, 1944), the watchman held to be subject to the Act was clearly engaged in the production of goods and the Court said at page 260:

> "Innumerable other cases also hold that *watchmen who are employed* to guard and protect property *for employers engaged in the production of goods for commerce* come within the provisions of the Act." (Italics added.)

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In *Russell Co.* v. *McComb*, 187 F. (2d) 524 (C. A. 5th, 1951), the Court said that "the night watchman in question is employed to guard appellant's premises, including the warehouse building, offices, the area inside in which the *coffee and rice are packaged* for distribution * * *" (page 525, italics added). The Court found that the watchman was engaged in the production of goods for commerce.

On the other hand the same Court of Appeals and the same Circuit Judge (McCord) in *Phillips* v. *Graham Aviation Co.*, 157 F. (2d) 443 (C. C. A. 5th, 1946), stated as follows at pages 443-4:

> "* * * appellants were employed as guards and watchmen by the Graham Aviation Company * * * in Georgia. Their duties and responsibilities were the usual ones of guards and watchmen to protect and safeguard persons and property on the premises of the employer.
>
> "Under contract with the United States Government, Graham Aviation Company was engaged in the training of student fliers for service in the air forces of the nation. Students from various parts of the United States were assigned to the field by military authorities. It is alleged that airplanes engaged in government service were frequently serviced and repaired at the field; that a canteen which sold goods that had been procured from the channels of interstate commerce, was operated for the benefit of students; and that planes from the field frequently crossed state lines—some going to Pennsylvania where appellee maintained another training field.
>
> "There is no issue as to the 'production of goods for commerce,' and appellants must stand or fall on the issue of whether they are 'engaged in commerce.' It is unnecessary to discuss whether appellee's business of training student fliers for the government and operating a flying field for that purpose can be considered interstate commerce, for under the Fair Labor Standards Act and the many decisions it is clear that in such

> cases as this the work of the particular employee is decisive. * * * The work of these appellants was purely local in character; a mere guarding of the local airfield and the personnel and property thereon. On the facts of this case, a holding that such activity is 'interstate commerce' would be stretching coverage beyond the breaking point to include a situation far beyond the pale of the act."

In *Walling* v. *Sondock*, 132 F. (2d) 77 (C. C. A. 5th, 1942), the Court said at page 78:

> "Appellees operate an agency engaged in the business of furnishing guards or watchmen to various customers in and about Houston, Texas. * * * Upon these principles, *those watchmen charged with the protection and preservation of the buildings and machinery used to produce goods for commerce* perform duties having an essential relationship to the process of producing and distributing goods in interstate commerce."

That all the courts have recognized the distinction between guarding production and guarding commerce is conclusively established by the following chart, which shows the most important cases holding that guards are covered by the act only when the employer is engaged in the production of goods for commerce.

Case	Citation	Jurisdiction and Year	Employee Not Covered by FLSA	Employer Engaged in Commerce Only	Employee Covered by FLSA	Employer Engaged in Production of Goods for Commerce	Facts
10 E. 40th St. Bldg. Inc. v. Callus	325 U. S. 578	U. S. Sup. Ct. 1945	x	x			Watchman of building in which 48% of rented area occupied by executive offices of manufacturing companies
Walton v. Southern Package Corp.	320 U. S. 540	U. S. Sup. Ct. 1944			x	x	Night watchman for veneer manufacturing plant
Mitchell v. Famous Realty, Inc.	211 F. 2d 198	C. A. 2d, 1954			x	x	Guarded building housing tenants engaged in production
General Electric Co. v. Porter	208 F. 2d 805	C. A. 9th, 1954			x	x	Firemen protected production area
Mitchell v. Mercer Water Co.	208 F. 2d 901	C. A. 3rd, 1954			x	x	Maintenance workers of company furnishing gas to manufacturers
Union Nat. Bank v. Durkin	207 F. 2d 848	C. A. 8th, 1953			x	x	Guarded bank which conceded it produced goods
Russell Co., Inc. v. McComb	187 F. 2d 524	5th Circ. 1951			x	x	Guarded area where coffee and rice were packaged
Parham v. Austin Co.	158 F. 2d 566	5th Circ. 1946	x	x			Guarded plant construction
Wilson v. R. F. C.	158 F. 2d 564	5th Circ. 1946	x			x	Guarded housing of employees of manufacturing plant
Phillips v. Graham Aviation Co.	157 F. 2d 443	5th Circ. 1946	x	x			Guarded air field
Carrigan v. Provident Trust Co.	153 F. 2d 74	3rd Circ. 1946	x	x			Guarded bank

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Case	Citation	Jurisdiction and Year	Employee Not Covered by FLSA	Employer Engaged in Commerce Only	Employee Covered by FLSA	Employer Engaged in Production of Goods for Commerce	Facts
Engebretsen v. E. J. Albrecht Co.	150 F. 2d 602	7th Circ. 1945			x	x	Guarded area where materials required for building dams, etc., were repaired
Building Service Employees Internation Union v. Trenton Trust Co.	142 F. 2d 257	3rd Circ. 1944	x	x			Guarded trust company
Blumenthal v. Girard Trust Co.	141 F. 2d 849	3rd Circ. 1944	x	x			Caretaker of apartment building
Slover v. Wathen	140 F. 2d 258	4th Circ. 1944			x	x	Watchman at pier where barges were repaired
Noonan v. Fruco Construction Co.	140 F. 2d 633	8th Circ. 1943	x	x			Guarded construction of building for manufacture of munitions
Convey v. Omaha National Bank	140 F. 2d 640	8th Circ. 1943	x	x			Guarded bank building
Lofther v. First National Bank	138 F. 2d 299	7th Circ. 1943	x	x			Guarded bank building
Waller v. Humphreys	133 F. 2d 193	5th Circ. 1943	x	x			Guarded sea food plant when not in operation
Walling v. Sondock	132 F. 2d 77	5th Circ. 1942			x	x	Independent agency guarding producers
Johnson v. Dallas Downtown Dev. Co.	132 F. 2d 287	5th Circ. 1942	x	x			Guarded insurance company building
Mid-Continent Pipe Line Co. v. Hargrave	129 F. 2d 655	10th Circ. 1942			x	x	Guarded pipe line
Messenger v. T. C. Co.	107 F. S. 354	Okla. 1951			x	x	Guarded cotton compressing operations

Case	Citation	Jurisdiction and Year	Employee Not Covered by FLSA	Employer Engaged in Commerce Only	Employee Covered by FLSA	Employer Engaged in Production of Goods for Commerce	Facts
Haynie v. Hogue Lumber & Supply Co.	96 F. S. 215	Miss. 1951	x	x			Guarded lumber yard
Craig v. Heide & Co.	94 F. S. 442	N. C. 1951			x	x	Guarded repair of vessels
Moehl v. DuPont & Co.	84 F. S. 427	Ill. 1947			x	x	Guarded ordnance plant
Bauler v. Pressed Steel Car Co.	81 F. S. 172	Ill. 1948			x	x	Guarded production of military goods
Campbell v. Jones & Laughlin Steel Co.	70 F. S. 996	Penn. 1947			x	x	Guarded steel plant
Lewis v. Florida Light & Power Co.	69 F. S. 23	Fla. 1946			x	x	Guarded electric generating plant
Walling v. West Kentucky Coal Co.	60 F. S. 681	Tenn. 1944			x	x	Guarded coal mine
Cushway v. Stork Engineering Co.	51 F. S. 568	Mich. 1943			x	x	Guarded factory
Hinkler v. 83 Maiden Lane	50 F. S. 263	N. Y. 1943	x	x			Guarded building housing insurance company
Reliance Co. v. Hubbard Storage & Inspection Co.	50 F. S. 1012	Va. 1943			x	x	Guarded raw tobacco prior to manufacture
Timberlake v. Day & Zimmerman, Inc.	49 F. S. 28	Iowa 1943			x	x	Guarded ordnance plant
Fleming v. Stillman	48 F. S. 609	Tenn. 1943			x	x	Guarded automobile reclamation plant
Bartholome v. Baltimore Fire Patrol Co.	48 F. S. 98	Md. 1942	x	x			Independent detective agency guarding various types of enterprises

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Administrative Interpretation. The Wage and Hour Administrator and later the Secretary of Labor have consistently construed the Act to include guards and watchmen only when they were guarding production.

Interpretative Bulletin No. 1 (as issued on October 12, 1938) provided in part in paragraph 5:

> "The second category of workers included, those engaged 'in the production of goods for (interstate) commerce,' applies typically but not exclusively, to that large group of employees engaged in manufacturing, processing, or distributing plants, a part of whose goods moves in commerce out of the State in which the plant is located. This is not limited merely to employees who are engaged in actual physical work on the product itself, because by express definition in section 3(j) an employee is deemed to have been engaged 'in the production of goods, if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation, necessary to the production thereof, in any State.' *Therefore the benefits of the statute are extended to such employees as maintenance workers, watchmen, clerks, stenographers, messengers, all of whom must be considered as engaged in processes or occupations 'necessary to the production' of the goods.*"

Interpretative Bulletin, Part 776, Subpart A—General, "General Coverage of the Wage and Hours Provisions" (May, 1950) provides in part in Section 776.11:

> "On the other hand, work which is less immediately related to the functioning of instrumentalities of commerce than is the case in the foregoing examples may be too remote from interstate or foreign commerce to establish coverage on the ground that the employee performing it is 'engaged in commerce.' This has been held true, for example, of a cook preparing meals for workmen who are repairing tracks over which interstate trains operate (*McLeod* v. *Threlkeld*, 319 U. S.

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491), and of a porter caring for washrooms and lockers in a garage which is not an instrumentality of commerce, where trucks used both in intrastate and interstate commerce are serviced (*Skidmore* v. *John J. Casale, Inc.*, 160 F. 2d 527, certiorari denied 331 U. S. 812, use in interstate commerce of trucks serviced was from 10 to 25 percent of total use)."

In relation to the case last cited, it may be noted that the guards in the present case guarded warehouses, out of which 2% (Wabash warehouse; R. 47-8) to 20% (Wentworth and Ashland warehouses; R. 17, 31-2) of all goods distributed were destined for Indiana stores or customers outside the State of Illinois.

Despite the Secretary of Labor's attempts to explain it in his brief, the fact is that watchmen have been held to be covered only when they were guarding production; the additional circumstance in some of the cases that they were *also* guarding commerce does not alter the fact. It is as though, assuming that criminal penalties were established by judicial precedent rather than by statute, respondent here produced a vast amount of authority in which the crime of murder resulted in the death penalty and the Secretary of Labor responded that in some of the cases the criminal was charged with petty larceny in addition to murder and therefore the death penalty is also the punishment for petty larceny. In other words the point is not that commerce may not also be involved, but that watchmen have never been held to be covered unless their employers were engaged in the production of goods for commerce.

2. The Function of Warehousing May Constitute Engaging in Commerce But Does Not Constitute the Production of Goods for Commerce; the Storage of Goods and the Carriage or Transportation of Goods Are Commerce But Are Not Production.

Again, it can be shown that the language of the Fair Labor Standards Act and Congressional intent, the Supreme Court and all lower courts considering the problem, as well as the Wage and Hour Administrator and Secretary of Labor in construing the Act, have held that the function of warehousing may amount to engagement in commerce but never constitutes production for commerce.

Statutory Language and Congressional Intent. Congress was intent primarily on regulating the wages and hours of work of employees handling goods *before the goods begin* their interstate journey and secondarily, *while the goods are on* their interstate journey, but not *after the goods have completed* their interstate journey. If it had been the intention of Congress to regulate the third as well as the first two stages, it would have been a simple matter to say so by adding to the words "in the production of goods *for* commerce" and "*in* commerce" the phrase "in the handling of goods *from* commerce," or, as in the case of the definition of "production for commerce" with respect to employees in the state of origin, by expanding the definition of "in commerce" to include employees handling goods after their arrival in the state of destination.

The President's Message of May 24, 1937, to the First Session of the Seventy-Fifth Congress, recommending national legislation with respect to wages and hours of certain employees, said in part (H. Doc. 255; 81 Cong. Rec. 4960 and 4983; S. Rep. No. 884, p. 1; H. Rep. No. 1452, p. 5):

"* * * we propose that only goods which have been

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> produced under conditions which meet the minimum standards of free labor *shall be admitted to interstate commerce.*"

The original bill (S. 2475 and H. R. 7200) applied to "employees in any occupation in which such employees are engaged in interstate commerce or are engaged in the production of goods which are *sold or shipped* to a substantial extent *in interstate commerce.*"

In testimony during joint hearings on the Fair Labor Standards Act bills (Joint Hearings Before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess.), Assistant Attorney General (later Mr. Justice) Jackson said (pp. 39-40):

> "It is intended to catch unfair labor practices at the point of production. * * * They must be fair goods if they move across the State line."

Mr. Leon Henderson testified that the proposed Act would cover those engaged in "industry" but not those engaged in "distribution and service" (p. 159).

At one point in the legislative history of the Act the House passed a bill (83 Cong. Rec. 7449) which regulated "every employer engaged in commerce in an industry *affecting* commerce" (Sections 4 and 5); defined an employer "engaged in commerce" as "an employer in commerce, or an employer engaged, in the ordinary cause of business, in *purchasing* or selling goods in commerce" (Section 3); and created administrative authority to declare an industry to be an "industry *affecting* commerce" if such industry was "dependent for its existence upon substantial *purchases* or sales of goods in commerce and upon transportation in commerce" (Section 6). This bill and the Senate bill went to conference, and the event of legislative history which cannot be overemphasized is that every

reference to "*purchasing*" in commerce and every reference to "*affecting*" commerce was struck from the Act. The bill was deliberately and thoughtfully reduced in scope to cover only employees *in* commerce or *in production for* commerce. Congress unmistakably showed its intention to go no further and not to include any employees handling goods *from* commerce.

The coverage of Sections 6 and 7 of the Act as finally enacted plainly was intended to be no more extensive than that of Section 8 providing for wage orders for "each *industry* engaged *in* commerce or *in the production of goods for* commerce," as is further emphasized by the declaration of policy in Section 2 that the purpose of the Act is to regulate "*industries* engaged in commerce or in the production of goods for commerce," yet any definition of warehousing by local retailers as an "industry" for such a wage order seems anomalous on its face. Moreover, an "industry committee" is directed by Section 8(c)(1) to "consider among other relevant factors * * * competitive conditions as affected by transportation, living and production costs," factors suited to production industries but not to storing or warehousing functions.

Supreme Court Cases. This Court has been entirely consistent in its consideration of warehouse employees as being engaged, in some situations, in commerce and, under other circumstances, in purely local activities, but never as engaged in production for commerce.

In *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943), the issues involved were described by this Court at pages 566-7:

> "The District Court held that none of respondent's employees in the seven branch [ware-] houses in question were subject to the Act. The Circuit Court of Appeals reversed. *Jacksonville Paper Co.* v. *Fleming*, 5 Cir., 128 F. 2d 395, 397. (1) It held that employees

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> who are engaged in the procurement or receipt of goods from other states are *'engaged in commerce'* within the meaning of § 6(a) and § 7(a) of the Act. (2) It also held that where respondent 'takes an order' from a customer and fills it outside the state and the goods are shipped interstate 'with the definite intention that those goods be carried at once to that customer, and they are so carried, the whole movement is interstate' and the entire work of delivery to their final destination is an employment *'in commerce.'* Those were the only types of transaction which the court held to be covered by the Act."

In other words, the entire problem was whether certain warehouse employees were engaged either in commerce or in local activities outside the scope of the Act. This Court expanded the coverage established by the Court of Appeals by holding that certain of the employees which the lower court had considered to be engaged in local activities, were actually engaged in commerce. None of the employees was ever considered to be engaged in production for commerce. This Court said at pages 567-8:

> "There is no indication (apart from the exemptions contained in § 13) that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency (cf. *De Loach* v. *Crowley's Inc.*, 5 Cir., 128 F. 2d 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom

> they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce."

In *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490 (1945), the issues were described at pages 492-3:

> "The District Court granted the injunction, holding (1) that the warehouse and central office employees were *engaged in interstate commerce* within the meaning of the Act and (2) that they were not exempted from the wage and hour provisions by reason of Section 13(a)(2) since the warehouse and office building did not constitute a retail establishment. D. C., 40 F. Supp. 749. The First Circuit Court of Appeals affirmed as to both points. 144 F. 2d 102. Petitioner, however, has sought review here only as to the second point. And certiorari was granted because of the *conflicting views expressed on this issue* by lower appellate courts."

In the *Phillips* case there was no dispute whatever over the proposition that warehouse employees, if covered by the Act, were covered because they were engaged in commerce. The only dispute was over the issue of whether a warehouse which was part of a large chain-store operation constituted a retail establishment. At no point in the *Phillips* case were any of the warehouse employees considered to be engaged in production for commerce. This Court said at page 497:

> "Here petitioner's warehouse and central office employees are performing wholesale duties *in the very midst of the stream of interstate commerce.* They constantly deal with both incoming and outgoing interstate shipments."

The lower court in the *Phillips* case (*A. H. Phillips, Inc.* v. *Walling*, 144 F. 2d 102 (C. C. A. 1st, 1944)) said at page 104:

> "Nowhere does it appear in the case at bar that the

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appellant denies that its warehouse and central office employees are *engaged in interstate commerce.* From the stipulated facts it is clear that these employees are engaged in work involving the receipt of merchandise from outside the state and in delivering merchandise from the warehouse to the retail stores in Connecticut. Further these goods come from points outside the state and after passing through the warehouse reach their final destination in the local retail stores. There is present that particularity in the continuity of their movement which shows that their entry in the warehouse was but a temporary pause in their interstate journey and they remain in interstate commerce until they are delivered at the retail stores."

The "conflicting views" expressed on the issue of what constitutes a retail establishment "by lower appellate courts" were identified by this Court in a footnote to its opinion on page 493:

> "The decision below in this case is in accord with the reasoning of *Walling* v. *American Stores Co.*, 3 Cir., 133 F. 2d 840, but is in conflict with *Allesandro* v. *C. F. Smith Co.*, 6 Cir., 136 F. 2d 75; *Walling* v. *L. Wiemann Co.*, 7 Cir., 138 F. 2d 602, 150 A. L. R. 878; and *Walling* v. *Block*, 9 Cir., 139 F. 2d 268."

It is important to note that although there existed a conflict of views over the retail establishment exemption, there was a unanimity of view by all of these important Courts of Appeal upon the issue as to whether warehouse employees are engaged in commerce or in production of goods for commerce.

In *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C. C. A. 3rd, 1943), the court said at page 846:

> "We think the conclusion from these facts is clear that there is in this case a practical continuity of movement of the goods until they reach the defendant's retail stores. The maintenance of the warehouse, as

> we read the findings of fact, is not to break that continuity but to make it even, economical and uninterrupted. *The conclusion, therefore, is that all of the defendant's warehouse employees are engaged in commerce within the meaning of the Act.*"

In *Allesandro* v. *C. F. Smith Co.*, 136 F. 2d 75 (C. C. A. 6th, 1943), the court said at page 76:

> "• • • all of the appellants who are employed in unloading interstate cars and moving merchandise into warehouses, or from the cars to the stores, are *engaged in interstate commerce* and within the coverage of the Act."

In *Walling* v. *L. Wiemann Co.*, 138 F. 2d 602 (C. C. A. 7th, 1943), the court said at page 604:

> "Appellant insists that appellee's warehouse and central offices employees are *engaged in interstate commerce.* • • •"

In *Walling* v. *Block*, 139 F. 2d 268 (C. C. A. 9th, 1943), the Court said at page 269:

> "*The trial court found* as a fact that the receipt of the goods and their subsequent distribution through the Seattle warehouse did not involve interstate commerce, that is to say, *that the employees there are not engaged in commerce. However, for purposes of decision we assume the contrary.*"

A close analysis of the Secretary's position in this case will reveal that he is contending here that all activity of any kind whatsoever except transportation is "production," thus conveniently disposing of what he apparently finds to be a somewhat bothersome and limiting concept of "engaging in commerce." Under this contention there is no longer any handling in the stream of commerce nor any local handling of goods: if any employee so much as touches goods he is engaged in its production for interstate commerce; if a watchman sees the handling, he is also pro-

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ducing. The result of such reasoning is to destroy entirely the heretofore unchallenged Congressional intent to make the Fair Labor Standards Act cover less area than constitutionally possible and to convert the Act into one which undoubtedly would cover more area than constitutionally possible.

It is not true that any "handling" constitutes production. The Supreme Court has made it clear that there can also be "handling" in commerce. In *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490 (1945), this court stated at page 503:

> "The next inquiry is whether the Western Union Telegraph Company is a producer of these goods within the Act. Congress has laid down a definition that as used in the Act ' " produced" means produced, manufactured, mined, handled, or in any other manner worked on * * *.' § 3(j). The Company, says the Government, not only 'handles' the message but 'works on' it.
>
> "The Government contends that in defining 'produced' the statute intends 'handled' or 'worked on' to mean not only handling or working on in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or movement in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a 'producer' of any goods he carries. But the statute, while defining 'produced' to mean 'handled' or 'worked on', has not defined 'handled' or 'worked on'. These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he

neither manufactures, produces, or mines the goods. We are clear that 'handled' or 'worked on' includes every kind of incidental operation preparatory to putting goods into the stream of commerce.

"If we go beyond this and assume that handling for transit purposes is handling in production, we encounter results which we think Congress could not have intended."

Lower Court Cases. In *Donovan* v. *Shell Oil Co., Inc.*, 168 F. (2d) 229 (C. C. A. 4th, 1948), the company had "no refinery in the State of Maryland, but it does maintain a bulk depot plant at Wagners' Point, Maryland." The Court held that "it is not and could not be disputed that the portion of the defendant's business with which we are here concerned, *i. e.*, the transportation of petroleum products into the State of Maryland from without the state, and *the subsequent distribution to points within and without Maryland, was commerce.*" Therefore the employer "was so closely related to the stream of commerce as to form a part of it." (Page 231; emphasis added.)

In *Walling* v. *American Stores Co.*, 133 F. (2d) 840 (C. C. A. 3rd, 1943), the Court held at page 846:

"We think the conclusion from these facts is clear that there is in this case a practical continuity of movement of the goods until they reach the defendant's retail stores. The maintenance of the warehouse * * * is not to break that continuity but to make it even, economical and uninterrupted. The conclusion therefore, is that all of the defendant's warehouse employees are engaged in commerce within the meaning of the Act."

In *Marchant* v. *Sands Taylor & Wood Co.*, 75 F. Supp. 783 (D. Mass., 1948), the Court held (at pages 784-785):

"[The defendant employer, a wholesaler in flour, coffee and tea] had warehouses in Somerville, Massachusetts (where the plaintiff was employed), Worces-

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ter, Massachusetts, and Providence, Rhode Island, as well as regular jobbers in New Hampshire. The plaintiff regularly shipped merchandise from the warehouse at Somerville for delivery to the warehouse in Providence, and to jobbers in other states. *The plaintiff was engaged in commerce within the meaning of the Act.* His work involved the interstate delivery of defendant's merchandise." (Emphasis added.)

At pages 786 and 787, the Court describes in some detail the character of the employee's activities:

"He made up loading lists for the trucks * * * He watched the inventory of flour * * * When a customer came to the warehouse for supplies, plaintiff rang a bell and summoned warehousemen to help the customer * * * When freight cars arrived, he summoned warehousemen to unload them. He collected the time-cards of other workers * * * He opened the warehouse in the morning and closed it at night * * * Plaintiff fired the coal stoker, parked trucks, ground coffee beans, and did other manual tasks regularly."

In *McComb* v. *Blue Star Auto Stores, Inc.*, 164 F. (2d) 329 (C. C. A. 7th, 1948), the Court *held* (at page 331):

"*Under the circumstances here appearing* it is now well settled that *warehouse* and central office employees who work either at selling or delivering across State lines, or at buying and receiving across State lines, *are employed in commerce* whether they write letters, keep books, or load or unload or drive the trucks * * * [citing cases]." (Emphasis added.)

As dictum the Court stated (at page 339):

"All employees engaged in procuring goods from other states for transportation to and delivery at employer's warehouses are engaged in 'commerce' within the meaning of the Act; likewise, employees engaged in unloading and checking goods shipped in interstate commerce, and in handling them on the platforms, as well as those engaged in shipping such goods from warehouses in Illinois to stores in another state are

> all engaged in the production of goods for commerce or in an occupation necessary to such production. *Walling* v. *Goldblatt Bros.*, 7 Cir., 152 F. 2d 475, 476."

In 152 F. 2d 475, the Court had held simply that the retail exemption did not apply to certain Goldblatt operations, and in *Walling* v. *Goldblatt Bros., Inc.*, 128 F. (2d) 778 (C. C. A. 7th, 1942), the Court held in connection with activities at Goldblatt warehouses that:

> *"Persons engaged in shipping goods to the Indiana stores are engaged in interstate commerce."* (Emphasis added.)

As we have previously shown in some detail, the Court did not hold in any of the *Goldblatt* decisions that employees performing a warehousing function (whether in connection with the receipt of goods into the warehouse, storage, or shipping out of the warehouse) were engaged in any activity other than commerce. It was held merely that certain employees involved in the manufacture or processing of goods were engaged in production for commerce.

Administrative Interpretation. The Wage and Hour Administrator and the Secretary of Labor, prior to this case, appear not to have contended that warehousing was production. To the contrary, they have explicitly stated that employees participating in warehouse activities (as opposed to guarding the scenes of such activities) are "engaged in commerce" rather than in "production for commerce", as the Secretary of Labor now contends.

Interpretative Bulletin No. 1 (as issued on October 12, 1938) provided in paragraph 4:

> "The first category of workers included, those 'engaged in (interstate) commerce,' applies, typically but not exclusively, to employees in the telephone, telegraph, radio, and transportation industries, since these industries serve as the actual instrumentalities

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and channels of interstate commerce. *Employees who are an essential part of the stream of interstate commerce are also included in the phrase 'engaged in commerce'; for example, employees of a warehouse whose storage facilities are used in the interstate distribution of goods.*"

Interpretative Bulletin, Part 776, Subpart A-General, "General Coverage of the Wage and Hours Provisions" (May, 1950) provides in part in Section 776.10:

> "Employees whose work is an essential part of the stream of interstate or foreign commerce, in whatever type of business they are employed, are likewise engaged in commerce and within the Act's coverage. *This would include, for example, employees of a warehouse whose activities are connected with the receipt or distribution of goods across State lines* (*Phillips Co.* v. *Walling*, 324 U. S. 490; *Clyde* v. *Broderick*, 144 F. 2d 348 (C. A. 10)."

The Secretary of Labor and, before him, the Wage and Hour Administrator have always been prone indiscriminately to charge every employee with being engaged both "in the production of goods for commerce" and "in commerce." While it is conceivable, and in a relatively few instances it is undoubtedly true, that a single employee may perform *separate functions* some of which involve him in engagement "in the production of goods for commerce" and others "in commerce," nevertheless the Supreme Court has made it abundantly clear in *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, that *any particular function performed by an employee may be either a production function or a commerce function but it cannot be both at the same time.* If transportation by a carrier constitutes engaging in commerce, it cannot at the same time constitute engaging in the production of goods for commerce. This is the entire essence of *Western Union* v. *Lenroot.* Similarly, every court which has considered the question

has held that the warehousing function may be a commerce function but it is not production. Once goods are in the stream of commerce, production ceases. When commerce ceases, the handling of the goods is again a local activity. All of the goods in the Goldblatt warehouses is either in the stream of commerce or at the end of it.

CONCLUSION.

The Secretary of Labor is clearly attempting in this case to extend coverage of the Fair Labor Standards Act to a new and previously uncharted boundary beyond the intention and contemplation of Congress, beyond the furthest reaches of the most liberal judicial interpretations, and even beyond the Secretary of Labor's own previous conception of his authority under the Act.

The Joyce Agency employees are neither engaged in commerce nor in the production of goods for commerce.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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